Supreme Court, U.S.
FILED

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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1998

JOSE DANIEL RUIZ CORONADO,

Petitioner,

- against -

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

---

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

(i) May a United States Attorney continue to restrain a bank account seized under the federal forfeiture laws -- after learning that there is no legal basis for the forfeiture of the account -- for the sole purpose of extracting from the bank account's owner a covenant not to sue the "government, or its agents or employees" for violations of the Electronic Communications Privacy Act and the Right to Financial Privacy Act occasioned by that seizure?

(ii) Does the written policy of the U.S. Attorney which requires obtaining a covenant not to sue from each and every claimant to property seized pursuant to federal forfeiture law prior to releasing seized property violate the U.S. Attorney's obligation to "do justice"?

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioner, Jose Daniel Ruiz Coronado, prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in that proceeding on June 2, 1999.

OPINION BELOW

The opinion of the United States District Court for the Southern District of Florida is reprinted in the appendix hereto, page A-2, *infra*. The opinion of the Court of Appeals for the Eleventh Circuit will not be published but is reprinted in the appendix hereto, page A-10, *infra*.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on June 2, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

Electronic Communications Privacy Act; 18 U.S.C. §2703

(1995) Requirements for governmental access

(a) Contents of electronic communications in electronic storage. A governmental entity may require the disclosure by a provider of electronic communication service of the contents of an electronic communication, that is in electronic storage in an electronic communications system for one hundred and eighty days or less, only pursuant to a warrant issued under the Federal Rules of Criminal Procedure or equivalent State warrant. A governmental entity may require the disclosure by a provider of electronic communications services of the contents of an electronic communication that has been in electronic storage in an electronic communications system for more than one hundred and eighty days by the means available under subsection (b) of this section.

Right to Financial Privacy Act; 12 U.S.C. §3406 (1996); Search warrants

(a) Applicability of Federal Rules of Criminal Procedure. A Government authority may obtain financial records under section 12 USCS §3402(3) only if it obtains a search warrant pursuant to the Federal Rules of Criminal Procedure.

Custom Duties; 19 U.S.C. §1604 Seizure; prosecution

It shall be the duty of the Attorney General of the United States immediately to inquire into the facts of cases reported to him by customs officers and the laws applicable thereto, and, if it appears probable that any fine, penalty, or forfeiture has been incurred by reason of such violation, for the recovery of which the institution of proceedings in the United States district court or the Court of International Trade is necessary, forthwith to cause the proper proceedings to be commenced and prosecuted, without delay, for the recovery of such fine, penalty, or forfeiture in such case provided, unless, upon inquiry and examination, the Attorney General decides that such proceedings can not probably be

sustained or that the ends of public justice do not require that they should be instituted or prosecuted, in which case he shall report the facts to the Secretary of the Treasury for his direction in the premises.

STATEMENT OF THE CASE

Petitioner Jose Daniel Ruiz Coronado is a citizen of the Republic of Colombia and was a customer owning a bank account in a commercial bank in Miami, Florida – BankAtlantic – during the time frame in question.

In or about June 1996, agents of the Drug Enforcement Administration seized Petitioner's bank account containing $27,846.22 at BankAtlantic upon allegations of money-laundering. At the same time, some one thousand one hundred other bank accounts at BankAtlantic were similarly seized.

Petitioner, pursuant to 19 U.S.C. §1608, filed a timely claim and cost bond to force judicial determination of his claim. After a delay of some eight months without filing a complaint for forfeiture *in rem*, the Government offered to release Petitioner's

funds with interest and return the entire cost bond solely upon the agreement that Petitioner not file any action against the Government arising out of the seizure of those funds.

That offer to Petitioner was memorialized by letter dated January 19, 1997, from a Special Assistant United States Attorney. In that letter, the Government conditioned the release of all of Petitioner's seized funds with accrued interest and the entire cost bond upon Petitioner agreeing "not to file any action against the government or its agents and employees . . . regarding the seizure of the above account."

Thereafter, on January 21, 1997, Petitioner, by and through counsel, advised the Government by letter that Petitioner had, three months earlier on October 28, 1996, sent a demand letter pursuant to the Federal Torts Claim Act, 28 U.S.C. §2671 *et seq.*, as a condition precedent to suit against the Government. That claim letter sought damages for (i) the wrongful seizure and (ii) wrongful access to Petitioner's financial information by federal agents.

On January 31, 1997, the Government reiterated the offer of January 19, 1997, after the amount actually seized had been resolved to the satisfaction of both parties.

On February 25, 1997, Petitioner accepted the offer of January 31, 1997, by letter. Thereafter, the Government confirmed the decision to decline the forfeiture and in due course (i) all of Petitioner's seized funds, (ii) the interest accrued since seizure thereon, and (iii) the cost bond were returned to and accepted by Petitioner.

After receipt of the seized funds, interest and cost bond, and in part upon discovering new evidence, on December 24, 1997, Petitioner filed a declaratory judgment action seeking a ruling that Petitioner's agreement not to sue the Government was void.

The Government served its motion to dismiss on February 23, 1998. Petitioner amended his complaint due to the imminent running of the statute of limitations. The amended complaint included additional causes of actions arising from the

Government's obtaining disclosure of Petitioner's financial information held by BankAtlantic without the requisite legal authority. Petitioner maintains th : the disclosures and seizures were prohibited and thereby violated the Right to Financial Privacy Act and the Electronic Communications Privacy Act.

Significantly, in the amended complaint Petitioner alleged that:

> Congress has created causes of actions under the Right to Financial Privacy Act and the Electronic Communication Privacy Act for bank account holders whose account information is accessed in violation of those acts' provisions. Upon information and belief, that being the statements of BankAtlantic's counsel in November 1997, the Defendant (i) violated those acts by the method of accessing Plaintiff's and the Account Holder's bank account information and (ii) was aware of those violations at the time the settlement was entered into between Plaintiff and the Defendant.

These causes of action under the Right to Financial Privacy Act and the Electronic Communications Act were recently recognized by the Eleventh Circuit in a related case consolidated at *Lopez v. First Union*, 129 F.3d 1186 (11th Cir. 1997) and also in an

unpublished opinion entitled *Villalba v. Coutts & Co.*, 96-5423 (Aug. 14, 1998).

Notably, contemporaneously with the release of Petitioner's account, the United States Attorney agreed to release on terms similar to Petitioner's approximately six hundred other seized accounts at BankAtlantic totaling some $20 million. These releases were similarly conditioned upon the waiver of any claim against the "government, its agents and employees" these account holders might have held.

As such, Petitioner additionally sought to be the class representative of those similarly situated six hundred BankAtlantic account holders who (i) had their bank accounts seized and (ii) were forced to waive any claim against the government in return for the release of their wrongfully seized funds.

The Government's renewed motion to dismiss was filed on June 9, 1998. The district court entered its order dismissing the amended complaint with prejudice on October 8, 1998.

Petitioner filed his timely notice of appeal on October 15, 1998.

The basis for federal jurisdiction in the United States District Court for the Southern District of Florida was pursuant to federal question jurisdiction under the provisions of the Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2510(9)(a), 2520, and 2710(c)(1) and the Right to Financial Privacy Act of 1978, 12 U.S.C. §§ 3416 and 3418.

REASONS FOR GRANTING THE WRIT

The first reason for granting this writ is that it should be axiomatic that the Government cannot utilize its grossly overreaching power in a civil forfeiture proceeding to insulate itself from civil liability for its wrongful actions.

The second reason for granting this writ is that the written policy of the United States Attorney to extract a covenant not to sue from each and every claimant in a civil forfeiture proceeding prior to releasing seized property – regardless of the legal basis for the seizure or forfeiture of the property – violates the U.S. Attorney's obligation to "do justice".

As these issues raise questions vital to the administration of justice, the writ should be granted.

I. The United States Attorney Cannot Use His Office For Private Gain

In its motion to dismiss, the Government's sole legal basis for seeking dismissal of the amended complaint for failure to state a cause of action is that the settlement agreement of the underlying forfeiture proceeding is not "unconscionable" and hence Petitioner's waiver of claims is enforceable.

Such a proposition would doubtlessly be true if the Government were a private entity.

However, it most clearly is not -- it is the United States Government acting through the office of the United States Attorney. The attorneys in that office carry a far different professional obligation than private attorneys. That different obligation materially changes the complexion of the requisite analysis here.

In the context of criminal prosecutions, this Court has

addressed this burden of the United States Attorney and the public policy considerations of waiver of civil claims by criminal defendants in return for dismissal of criminal charges against them. Given the "quasi-criminal" nature of forfeitures, these same considerations should be of equal force in the instant case.

In *Town of Newton v. Rumery*, 480 U.S. 386; 107 S.Ct. 1187; 94 L.Ed.2d 405 (1987), this Court decided the issue of whether a "release-dismissal" agreement through which a plaintiff "released" his potential 42 U.S.C. §1983 claims in return for "dismissal" of pending criminal charges violated public policy considerations. The plaintiff in *Rumery* had been arrested for witness tampering arising from alleged threats made to a victim of a sexual assault. Subsequent to his arrest, his counsel negotiated a settlement wherein the plaintiff released any claims he had arising from his arrest in exchange for the dismissal of the pending criminal charges against him.

While this Court held that such an agreement was not *per se* void, it nonetheless concluded that such an agreement was

valid only if it was voluntarily entered into, was without prosecutorial misconduct and did not adversely affect the public interest. *Rumery* at 398.

This conclusion was based upon the premise that "[t]he relevant principle is well established: a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement." *Rumery* at 392.

Here, that "harmed public policy" is that the U.S. Attorney may not use his office for private gain. This public policy is well codified at "Basic obligation of public service", found at 5 C.F.R. §2635.101 which states in pertinent part:

> (a) Public service is a public trust. Each employee has a responsibility to the United States Government and its citizens to place loyalty to the Constitution, laws and ethical principles above private gain.

Here, by extracting a covenant not to sue from the Petitioner to shield personal liability of the Government's "agents and employees", the U.S. Attorney is using his office for private gain.

Moreover, three further points from *Rumery* argue for granting this writ. First, in *Rumery*, the criminal defendant was only arrested, not charged by indictment. In this instant case, the prosecutor realized he had no basis for forfeiture of the Petitioner's account – witness the complete return of not only the principal seized, but the interest accrued on the principal and the complete cost bond. Furthermore this same result was had in over 600 other bank accounts seized at the same time. Clearly, there wasn't a scintilla of evidence for prosecution and no public interest was being served by continuing to hold the seized funds.

Second, in *Rumery* the action sought to be pursed was under §1983. Here, the actions sought to be pursued were pursuant to the Right to Financial Privacy Act and the Electronic Communications Privacy Act.

In the former, the rights sought to be vindicated are rights secured by Constitution. In the latter, Congress has spoken in unequivocal terms about the limits of government action in regards to bank accounts. This clear limitation on government

access to bank accounts is coupled with severe penalties, including criminal penalties, for transgression.

By utilizing his office for private gain, the U.S. Attorney has frustrated Congress' intent expressed in the Electronic Communications Privacy Act and the Right to Financial Privacy Act. This frustration is even more glaring when the 600 other bank accounts at issue are considered.

Last, there was no judicial supervision of the settlement agreement here thereby accomplishing what the U.S. Attorney sought from the very beginning . . . insulation from scrutiny of this prosecutorial excess.

II. A Policy Requiring A Covenant Not To Sue In Every Civil Forfeiture Settlement Is Inconsistent With The U.S. Attorney's Obligation To "Do Justice"

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation

to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." *Berger v. United States*, 295 U.S. 78, 88; 55 S. Ct. 629, 633; 79 L. Ed. 1314 (1935).

In the context of civil forfeiture the exhortation that "justice shall be done" must include returning promptly to a claimant property for which there is no basis for forfeiture. Both common sense and the statutory scheme laid out at 19 U.S.C. §1604, which dictates such a return, require this outcome.

However, the Department of Justice's *Asset Forfeiture Policy Manual*, (1996), Ch. 3, §C(1)(a)(6) requires in each and every settlement where a claim and cost bond was filed a clause including a:

> hold harmless provision and a general waiver of Federal Tort Claims Act rights and *Bivens* actions, as well as other actions based on the Constitution *(e.g.,* the Excessive Fines Clause). Finally, a *Halper* waiver should be included so that future civil or criminal cases are not hampered by the settlement agreement.

A similar blanket policy was found to violate a

prosecutors obligations in *Cain v. Darby Borough*, 7 F.3d 377 (3rd Cir. 1992). In *Cain*, the criminal defendant sued the arresting officers for misconduct occurring during his arrest. In response, the arresting officers moved for summary judgment on the grounds that as part of the agreement to dismiss the criminal charges upon successful completion of a rehabilitation program, the criminal defendant had agreed not to sue the arresting officers. *Cain* at 379.

Noteworthy to the instant case was that it was the blanket policy of the Delaware County District Attorney's Office to require a release of civil rights claims against all government officials in every case which was resolved by referral to a rehabilitation program.

In holding that such a blanket policy was unrelated to any legitimate prosecutorial function and hence violated *Rumery*, the court stated, "It cannot be disputed that the District Attorney's blanket policy is wholly and patently unrelated to the goals of [the rehabilitation program]." *Cain* at 383. As such, the court

concluded such reliance was insufficient to discharge the government's obligation under *Rumery* to consider each case separately. *Cain* at 383.

Here, the same scenario presents itself as the Department of Justice requires, without considering whether it is appropriate, a waiver of claims by each claimant in every settlement it enters into. Such a blanket policy is "wholly and patently unrelated" to legitimate prosecutorial function. Indeed, it serves only to insulate the government and its agents from liability regardless of their conduct. This is the very fear that this Court in *Rumery* responded to by its holding that the prosecutor's motivation was an issue to be considered in "release-dismissal" agreements. *Rumery* at 397, n.7.

Accordingly, as return of what is rightfully Petitioner's to him is the obligation of the United States Attorney, the policy of requiring a "waiver of claims" from Petitioner prior to that release is an unauthorized and gross abuse of this public office to deny justice to Petitioner.

CONCLUSION

For the foregoing reasons and to secure the proper administration of justice, this Court should exercise its jurisdiction and grant this Petition.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No.: 97-4400-CIV-NESBITT

JOSE DANIEL RUIZ CORONADO

Plaintiff,

vs.

UNITED STATES OF AMERICA,

Defendant
/

Order Granting Motion to Dismiss

This cause comes before the Court upon Defendant's Motion to Dismiss, filed June 9, 1998 (D.E. #9). Defendant United States of America urges the Court to dismiss this case in its entirety. On June 19, 1998 (D.E. #10) Plaintiff filed its Response, and on July 1, 1998 (D.E. #11), Defendant United States of America (the "government") filed its reply.

FACTUAL BACKGROUND

On December 24, 1997 Plaintiff filed this action seeking declaratory relief from a settlement agreement he entered into with the government. Plaintiff contends that on or about June

1996, federal agents seized Plaintiff's account, as well as hundreds of other accounts, at BankAtlantic. After a delay of eight months, the government offered to release Plaintiff's funds with interest only upon the agreement that Plaintiff waive his right to sue the government for the seizure. On February 25, 1997, Plaintiff, who was represented by counsel, accepted the government's offer.

Plaintiff's initial Complaint requests that the Court declare that he is not bound by his agreement not to file an action against the government due to the seizure of his accounts. On May 28, 1998 (D.E. #8) Plaintiff filed an Amended Complaint which, in addition to the request for declaratory relief, contains five claims under the Electronic Communications Privacy Act, 18 U.S.C. §2501 et seq.

Plaintiff maintains that the settlement agreement it entered into with the government is void for unconscionability. In its Motion to Dismiss, the government alleges that the settlement agreement is not void for unconscionability and that all of

Plaintiffs claims should be dismissed.

STANDARD OF REVIEW

Rule 12(b) (6) of the Federal Rules of Civil Procedure authorizes a court to dismiss a claim on the basis of a dispositive issue of law. See Neitzke v. Williams, 490 U.S. 319, 326 (1989) However, the Court is confined to a review of the allegations pled in the complaint, must accept those allegations as true, and must resolve any factual issues in a manner favorable to the nonmovant. See Quinones v. Durkis, 638 F. Supp. 856, 858 (S.D. Fla. 1986). Thus, the Court may dismiss a claim pursuant to Rule, 12(b) (6) only if it is clear that no relief could be granted under any set of facts consistent with the allegations. Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984); Conlev v. Gibson, 355 U.S. 41, 45-46 (1957).

DISCUSSION

Plaintiff maintains that as the government is not a private entity and acts through the United States Attorney's office, it has a duty to insure that justice is done. Plaintiff contends that since

the government lacked a legitimate basis to seize his account, the U.S. Attorney's office did not act ethically when it conditioned the return of the seized funds upon Plaintiff's waiver of claims. To further bolster his argument, Plaintiff argues that the procedure used to seize his accounts is extremely advantageous to the government and that the amount seized, $27,846.22, is too small to justify the expense he would have incurred if he had disputed the seizure.

The government maintains that the agreement is valid because Plaintiff was represented by counsel at all phases of the negotiation process and because a party who has had property seized by the government has an adequate remedy at law to dispute such seizure. The government also maintains that Plaintiff received a benefit, the return of the seized funds plus interest, in return for his waiver.

A contract is unconscionable where the circumstances demonstrate that there was "an absence of meaningful choice on the part of one of the parties together with contract terms which

are unreasonably favorable to the other party." Williams v. Walker Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965). Courts in this circuit have held that to establish unconscionability a party must show that both procedural and substantive unconscionability exist. See Golden v. Mobil Oil Corp., 882 F.2d 490, 493 (11th Cir. 1989)

> Substantive unconscionability generally can be established by alleging and proving that the terms of a contract are onerous, unreasonable or unfair. Procedural unconscionability speaks to the individualized circumstances surrounding each contracting party at the time the contract was executed. The courts will consider the manner in which a particular contracting party's age, education, intelligence, financial position, business experience and other factors affected that party's bargaining position and whether such factors permitted the party to have a meaningful choice in the contract.

Complete Interiors, Inc. v. Behan, 558 So. 2d 48, 52 (Fla. 5th DCA 1990) . Whether a contract is unconscionable is generally a question of law for the court to determine considering the facts surrounding the transaction. See id. at 53.

The Court finds that under the circumstances of, this case,

as stated in the Amended Complaint, the agreement was neither substantively nor procedurally unconscionable. The Amended Complaint establishes that Plaintiff was represented by counsel when negotiating the settlement and had already filed a demand letter pursuant to the Federal Tort Claims Act, regarding the seizure of his bank account. Instead of maintaining his claim against the government, Plaintiff agreed to enter into the settlement knowing that as a result, he waived all right to sue the government. Thus, the circumstances surrounding the execution of the agreement do not demonstrate that Plaintiff lacked a meaningful choice when he entered the agreement. See also F.M. v. Palm Beach County, 912 F. Supp. 514, 515 (S.D. Fla. 1995) (the fact that plaintiff was represented by counsel weighed heavily in determining the validity of the agreement), aff'd, 84 F.3d 438 (11th Cir. 1996)

Although Plaintiff criticizes the law regarding civil forfeitures, it undoubtedly offers Plaintiff with an avenue by which to obtain relief. Plaintiff, however, knowingly chose not to

pursue that avenue and to settle his claim. Plaintiff admits that he received a benefit from his decision to settle his claim, interest on his funds and a quick resolution to the proceedings. Thus, the Court finds that the facts alleged in the Amended Complaint fail to demonstrate that Plaintiff lacked a meaningful choice when he agreed to settle his claims with the government.

CONCLUSION

Accordingly, it is hereby ORDERED and ADJUDGED that

1. Defendant's Motion to Dismiss (D.E. #9) is GRANTED.

2. This case is CLOSED and all pending motions not otherwise ruled upon are DENIED as moot.

DONE and ORDERED in Chambers, Miami, Florida, this 8th day of October, 1998.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
CASE NO.: 98-5615
NON-ARGUMENT CALENDAR
D.C. DOCKET NO.: 97-4400-CV-LCN

JOSE DANIEL RUIZ CORONADO

Plaintiff-Appellant,

vs.

UNITED STATES OF AMERICA,

Defendant-Appellee.

---/

Appeal from the United States District Court
for the Southern District of Florida

(June 2, 1999)

Before TJOFLAT, EDMONDSON and COX, Circuit Judges.

PER CURIAM:

Jose Daniel Ruiz Coronado appeals following the district court's dismissal of his declaratory judgment action against the United States. We address only one issue: whether the rule of *Town of Newton v. Rumery*[1] prohibited the Government from

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[1] 480 U.S. 386, 107 5. Ct. 1187 (1987).

demanding a release of liability in exchange for dropping a forfeiture action against Coronado's property. Concluding that this release was enforceable, we affirm.

Background

According to the amended complaint and attachments to it, federal agents seized Coronado's account at BankAtlantic upon suspicion of money laundering. About 1100 other accounts at the bank were seized at the same time. A few months later, counsel representing Coronado and similar situated account holders at BankAtlantic filed a claim under the Federal Tort Claims Act. (R.8-Ex. B at 2.) The demand letter alleged violation of the Electronic Communications Privacy Act of 1986, 18 U.S.C. §§ 2516, 2518, and 2703(a), and the Right to Financial Privacy Act of 1978, 12 U.S.C. §3401 et seq.

A few months later, and apparently in ignorance of Coronado's demand, the special assistant United States attorney (SAUSA) to whom the BankAtlantic seizure cases had been assigned offered to forgo a forfeiture action and return

Coronado's money. In exchange, the SAUSA demanded from Coronado a promise not to sue the Government or its agents on any claim regarding the seizure. Coronado responded through counsel. He notified the SAUSA of the pending Federal Tort Claims Act demand, and then he accepted the settlement. The Government and Coronado agreed on the actual amount seized, and the Government returned the seized money with interest.

Nearly a year later, Coronado sued the Government, seeking a declaratory judgment that the release was unconscionable and thus unenforceable. The Government moved to dismiss the complaint. The district court granted the motion after determining that the release was neither substantively (Coronado got his money back without litigation) or procedurally (Coronado was represented by sophisticated counsel) unconscionable. Coronado now appeals. Our review is de novo. See *United States v. Pemco Aeroplex, Inc.*, 166 F.3d 1311, 1313 (11th Cir. 1999).

Discussion

Public policy (in particular the role that actions under 42 U.S.C. §1983 play in guarding private liberties) does not per se bar voluntary agreements between a prosecutor and a defendant to swap dismissal of pending charges for a release of public officials from any liability arising from an arrest or charges. *Town of Newton v. Rumery*, 480 U.S. 386, 394, 107 S. Ct. 1187, 1193 (1987). Coronado would have us extend *Rumery* to releases exchanged for the return of seized property.

We could accept that *Rumery's* core holding (that an involuntarily entered release is invalid) applies with equal force to agreements such as Coronado's. But even if we make such an assumption, no facts alleged here show coercion, or even overreaching. Coronado advances two inferences to be drawn from his complaint that make the agreement involuntary. The first is prosecutorial misconduct in the underlying seizure. This conduct does not, however, show involuntariness of the release. All it shows is that Coronado may have had an arguable claim to

release in accepting the SAUSA's offer. We could imagine circumstances in which prosecutorial conduct, such as concealing misfeasance, could have some effect on the voluntariness of a release. But here, as the attachments to the complaint show, Coronado was not only fully aware of his rights; he was also pursuing them when he entered the release. In short, whether or not the Government seized the money illegally should have entered into Coronado's weighing of the pros and cons of releasing the Government from liability, but it would hardly make the release involuntary.

Second, Coronado argues that the Government held the Appellant's property hostage and thus made his acceptance of the release involuntary. (Appellant's Br. at 7.) Holding property hostage is not enough to render acceptance involuntary. The Supreme Court concluded in *Rumery* that a Government threat to a citizen's liberty was insufficient to render a release involuntary; as the Court put it, "[t]he criminal process, like the rest of the legal system, is replete with situations requiring 'the making of

difficult judgments' as to which course to follow." *Rumery*, 480 U.S. at 393, 107 S. Ct. at 1192 (*Crampton v. Ohio*, decided with *McGautha v. California*, 402 U.S. 183, 213, 91 S. Ct. 1454, 1470 (1971) (in turn quoting *McMann v. Richardson*, 397 U.S. 759, 769, 90 S. Ct. 1441, 1448 (1970)). If a threat to a citizen's liberty interests is insufficient to invalidate a release, then a threat to mere property interests is also insufficient.

For these reasons, we conclude that the release was voluntary and enforceable even if we assume that *Rumery* governs.

Conclusion

For the foregoing reasons, the dismissal of the complaint with prejudice is

AFFIRMED.

Supreme Court, U.S.
FILED
OCT 12 1999
CLERK

No. 99-278

In the Supreme Court of the United States

JOSE DANIEL RUIZ CORONADO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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No. 09-978

In the Supreme Court of the United States

JOSE DANIEL RUIZ CORONADO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
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QUESTIONS PRESENTED

1. Whether the United States properly may demand that a property owner release liability against the government and its officials in exchange for the government's dismissal of a forfeiture action against the property owner.

2. Whether the government may adopt a policy requiring that the terms of a settlement of a forfeiture case must include a "hold harmless" provision and general waiver of Federal Tort Claims Act and *Bivens* claims.

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Statutes and regulations:

Electronic Communications Privacy Act of 1986, 18 U.S.C. 2510 *et seq.*:	
18 U.S.C. 2516	2
18 U.S.C. 2518	2
18 U.S.C. 2703(a)	2
Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.*	2
Right to Financial Privacy Act of 1978, 12 U.S.C. 3401 *et seq.*	2
19 U.S.C. 1608	2
42 U.S.C. 1983	7

Miscellaneous:

U.S. Dep't of Justice, *Asset Forfeiture Policy Manual* (1996)	6, 7, 9

In the Supreme Court of the United States

No. 99-278

JOSE DANIEL RUIZ CORONADO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit (Pet. App. A9-A14) is unpublished, but the decision is noted at 182 F.3d 936 (Table). The order of district court (Pet. App. A2-A8) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 1999. The petition for a writ of certiorari was filed on August 16, 1999. This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a citizen of the Republic of Colombia. According to petitioner's amended complaint, federal

agents seized petitioner's bank account at BankAtlantic in Miami, Florida, upon suspicion of money laundering. Federal agents at the same time also seized about 1,100 other accounts. Pet. 4; Pet. App. A10.

Petitioner filed a timely claim and cost bond pursuant to 19 U.S.C. 1608 in order to trigger judicial condemnation proceedings. Petitioner also filed a claim under the Federal Tort Claims Act (FTCA), 28 U.S.C. 2671 *et seq.*, by submitting a demand letter seeking damages resulting from the seizure and the government's access to his financial information. The demand letter alleged that the seizure violated the Electronic Communications Privacy Act of 1986, 18 U.S.C. 2516, 2518, and 2703(a), and the Right to Financial Privacy Act of 1978, 12 U.S.C. 3401 *et seq.* See Pet. App. A10; Pet. 4-5.

A few months later, and in apparent ignorance of petitioner's demand under the FTCA, the Special Assistant United States Attorney (SAUSA) assigned to the BankAtlantic seizure cases offered to forgo a forfeiture action and return petitioner's money. The offer of settlement required that petitioner release any claim against the government or its agents regarding the seizure. Responding through counsel, petitioner notified the SAUSA of the pending FTCA demand but accepted the settlement, including the terms of the release. The government and petitioner agreed on the actual amount seized and the government returned the money with interest. Pet. App. A10-A11.

2. Nearly a year later, petitioner filed this suit against the government, seeking a declaratory judgment that the release was unconscionable and unenforceable. The district court granted the government's motion to dismiss the complaint. Pet. App. A1-A8.

The district court found that the settlement agreement "was neither substantively nor procedurally

unconscionable." Pet. App. A7. The district court explained that petitioner had entered into the settlement knowing that he was waiving his right to sue the government; that he understood that the civil forfeiture law provided him with an alternative avenue for recovery of his seized property; that he was represented by counsel when he made his choice; and that he admitted he received a benefit from his decision to settle his claim, including interest on his funds and a quick resolution of the proceedings. *Id.* at A7-A8. Consequently, the court concluded, petitioner had failed "to demonstrate that [he] lacked a meaningful choice when he agreed to settle his claims with the government." *Id.* at A8.

3. The court of appeals affirmed. Pet. App. A9-A14. The court of appeals observed that this Court's decision in *Town of Newton* v. *Rumery*, 480 U.S. 386, 394 (1987), made clear that public policy "does not per se bar voluntary agreements between a prosecutor and a defendant to swap dismissal of pending charges for a release of public officials from any liability arising from an arrest or charges." Pet. App. A12. The court of appeals held that petitioner had not alleged any facts that demonstrated that the release in this case involved "coercion, or even overreaching" that would render the agreement unenforceable. *Ibid.*

The court of appeals rejected petitioner's contention that the alleged prosecutorial misconduct in the underlying seizure necessarily meant that the petitioner involuntarily executed the release. The court explained that petitioner's allegation simply "shows * * * that [petitioner] may have had an arguable claim to release" and that petitioner "was * * * fully aware of his rights" and "pursuing them when he entered the release." Pet. App. A12-A13. The court similarly found

unpersuasive petitioner's argument that the government's holding petitioner's property "hostage" rendered acceptance of the agreement involuntary. *Id.* at A13. The court of appeals explained that, because the Court in *Rumery* found that a threat to a citizen's liberty interest in facing criminal charges was insufficient to invalidate a release, "then a threat to mere property interests is also insufficient" to render a release involuntary. *Id.* at A14.

ARGUMENT

1. a. In *Town of Newton* v. *Rumery*, 480 U.S. 386, 398 (1987), this Court upheld a "release-dismissal" agreement in which a prosecutor agreed to dismiss criminal charges against an individual who in return agreed to release any claims against the town or its officials. The Court concluded that the agreement was voluntary; there was no evidence of prosecutorial misconduct; and the enforcement of the agreement would not adversely affect the public interest. *Id.* at 398.

In reaching those conclusions, the Court in *Rumery* rejected the notion that release-dismissal agreements are subject to a per se bar. 480 U.S. at 392, 394. The Court reasoned that such agreements are not "inherently coercive," observing that "[i]n other contexts criminal defendants are required to make difficult choices that effectively waive constitutional rights." *Id.* at 393. Moreover, the Court explained, "[i]n many cases a defendant's choice to enter into a release-dismissal agreement will reflect a highly rational judgment that the certain benefits of escaping criminal prosecution exceed the speculative benefits of prevailing in a civil action." *Id.* at 394. In determining that "Rumery's voluntary decision to enter this agreement ex-

emplifie[d] such a judgment," the Court observed that

> Rumery [was] a sophisticated businessman. He was not in jail and was represented by an experienced criminal lawyer, who drafted the agreement. Rumery considered the agreement for three days before signing it. The benefits of the agreement to Rumery are obvious: he gained immunity from criminal prosecution in consideration of abandoning a civil suit that he may well have lost.

Ibid.

The circumstances surrounding petitioner's execution of the release agreement in this case are far less coercive than those in *Rumery*. Rumery had been arrested and accused of tampering with a witness in violation of state criminal law. See 486 U.S. at 390. The choice he faced was "a choice between facing criminal charges and waiving his right to sue under § 1983." *Id.* at 393. As the court of appeals explained, if, as *Rumery* holds, "a threat to a citizen's liberty interests is insufficient to invalidate a release, then a threat to mere property interests is also insufficient." Pet. App. A14.

Furthermore, like Rumery, petitioner was not in jail and "was represented by sophisticated counsel" who negotiated the agreement on his behalf, Pet. App. A11; and petitioner took nearly a month to consider the offer before accepting it.[1] As in *Rumery*, "[t]he benefits of

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[1] The offer of settlement was memorialized in letter from the SAUSA to petitioner's attorney on January 19, 1997. C.A. R.E. Exh. A. On January 24, 1997, petitioner, through his attorney, made a counteroffer, disputing only the amount actually seized by the government. *Id.* Exh. C. On January 31, 1997, the SAUSA reiterated the January 19 offer, after the amount actually seized

the agreement to [petitioner] are obvious." 480 U.S. at 394. In consideration for abandoning his FTCA claims, petitioner obtained the return of his money, with interest, and without incurring the costs, efforts, and risks of litigation.

Indeed, petitioner does not argue in this Court that he involuntarily released his claims against the government. Rather, he contends (Pet. 10-14) that the release is unenforceable because the SAUSA abused his public office in shielding public officials from personal liability. Petitioner offers no evidence or basis, however, for concluding that the SAUSA actually sought to use his office for private gain in connection with the execution of the release in this case. See *Rumery*, 480 U.S. at 395 n.5 (plurality opinion) ("the constituency of an elected prosecutor is the public, and such a prosecutor is likely to be influenced primarily by the general public interest").

In seeking the release, the SAUSA was acting pursuant to the Department of Justice's *Asset Forfeiture Policy Manual*, which directs government attorneys seeking to settle civil forfeiture cases to secure a release of claims from the property owner.[2] The

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had been resolved to the satisfaction of both parties. *Id.* Exh. D. Petitioner then accepted the January 31 offer on February 25, 1997. *Id.* Exh. E.

[2] The *Asset Forfeiture Policy Manual* states, in pertinent part:

> The following requirements must be met where a claim and a cost bond have been filed and the case has been referred to the United States Attorney but a settlement is reached before a civil judicial complaint has been filed:
>
> (a) The terms of the settlement should be reduced to writing by the United States Attorney and include:

SAUSA complied with that directive and reasonably settled the forfeiture action to avoid the cost and burden of litigating the forfeiture proceeding against petitioner (which was only one of many such proceedings the SAUSA was handling) and simultaneously to foreclose the possibility of a civil suit by petitioner. See *Rumery*, 480 U.S. at 398 (noting prosecutor "had an independent, legitimate reason to make this agreement directly related to his prosecutorial responsibilities").

b. Petitioner's attempts (Pet. 13-14) to distinguish this case from *Rumery* are unpersuasive. Petitioner first asserts (Pet. 13) that the prosecutor in this case "realized he had no basis for forfeiture of the Petitioner's account," based on the fact that the SAUSA settled petitioner's case along with a large number of other related forfeiture cases. Those facts, however, do not demonstrate that the prosecutor lacked any basis for the seizure of petitioner's property. Indeed, the seizing agents had followed prescribed procedures and obtained judicial authorization prior to effecting the seizure. Gov't C.A. Br. 3. Moreover, the application for seizure was supported by a sworn affidavit containing information derived from court-authorized electronic surveillance and from grand jury information whose disclosure had been approved by a federal district judge. *Ibid.*

Petitioner next asserts (Pet. 13) that the claims released in *Rumery* arose under 42 U.S.C. 1983, while the

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* * * * *

(6) A "hold harmless" provision and a general waiver of Federal Tort Claims Act rights and *Bivens* actions, as well as other actions based on the Constitution * * *.

U.S. Dep't of Justice, *Asset Forfeiture Policy Manual* 3-8 to 3-9 (1996).

actions petitioner wishes to pursue arise under the Right to Financial Privacy Act and the Electronic Communications Privacy Act. The Court in *Rumery*, however, did not rest its decision on the type of claim released, or whether the claims arose under constitutional or statutory law. In fact, the release in *Rumery* extended to all claims against the city or its officials. 480 U.S. at 390-391.

Petitioner also errs in contending (Pet. 14) that *Rumery* is distinguishable because in this case "there was no judicial supervision of the settlement agreement." The Court in *Rumery* expressly acknowledged that release-dismissal agreements, unlike plea bargains, generally are not subject to judicial oversight. 480 U.S. at 393 n.3. The Court nonetheless determined that release-dismissal agreements do not "pose a more coercive choice" than plea bargains in which defendants waive substantial constitutional rights. *Id.* at 393.

2. Petitioner also argues (Pet. 14-17) that the policy embodied in the Justice Department's *Asset Forfeiture Policy Manual* requiring government attorneys to include a "hold harmless" provision and general waiver in civil forfeiture settlements (see note 2, *supra*) contravenes public policy because prosecutors have a duty to return property wrongfully withheld. The validity of the government's general settlement policy, however, was not addressed by the court of appeals. This Court ordinarily does not consider questions not specifically passed upon by the courts below. *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 697 (1984); *California* v. *Taylor*, 353 U.S. 553, 557 n.2 (1957).

In any event, petitioner's contention lacks merit. The government's policy does not require prosecutors to retain property "for which there is *no basis for forfeiture*," unless the property owner executes a release.

Pet. 15 (emphasis added). Rather, the policy explicitly mandates that, with respect to any settlement, "[t]here must be a statutory basis for the forfeiture of the property and sufficient facts stated in the settlement documents to satisfy the elements of the statute." U.S. Dep't of Justice, *Asset Forfeiture Policy Manual* 3-2 (1996). Thus, the government's policy does not prohibit a prosecutor from exercising his judgment to return property rightfully belonging to his owner, even if the owner refuses to release the government from claims arising out of the forfeiture.

This case is therefore unlike the situation that confronted the court of appeals in *Cain* v. *Darby Borough*, 7 F.3d 377 (3d Cir. 1992) (en banc), cert. denied, 510 U.S. 1195 (1994), relied upon by petitioner (Pet. 16-17). In *Cain*, the court of appeals invalidated a county district attorney's office policy that required every criminal defendant to execute a release-dismissal agreement before the district attorney would approve the defendant's participation in a program known as "Accelerated Rehabilitative Disposition" (ARD). 7 F.3d at 382-383. The ARD program permitted a prosecutor to move the court to place the defendant on probation without trial and to dismiss criminal charges against him upon successful completion of the program. *Id.* at 379. The court observed that the ARD program was primarily designed to rehabilitate first-time offenders by offering them a clean record if they successfully completed the program. *Id.* at 382. The court concluded that the blanket policy requiring a defendant to sign a release-dismissal agreement to be eligible for ARD was "wholly and patently unrelated to the goals of ARD," because the policy "[did] not seek to rehabilitate those who are deemed capable of it, nor

[did] it seek to protect society from those who are not." *Id.* at 383.

The policy at issue in this case is entirely different. Whereas the defendants who did not sign a release in *Cain* lost the opportunity to participate in the ARD program, here property owners always retain the right to seek return of their property through judicial forfeiture proceedings if they want to retain the right to sue government actors. Moreover, the government's forfeiture settlement policy specifically requires a prosecutor to have a factual and legal basis for the forfeiture before requiring the property owner to execute a release. Thus, the government's policy does not pose the danger that prosecutors will make arbitrary judgments unrelated to legitimate prosecutorial duties. See *Rumery*, 480 U.S. at 395 (plurality opinion) (noting potential danger that release-dismissal agreements "may tempt prosecutors to bring frivolous charges"); see also 480 U.S. at 400 (O'Connor, J., concurring).[3] Petitioner therefore has not shown that the government's policy is contrary to public policy.

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[3] Nor does the government's policy create an incentive for prosecutors "to dismiss meritorious charges." *Rumery*, 480 U.S. at 395 (plurality opinion); see also *id.* at 400 (O'Connor, J., concurring). The policy does not require prosecutors to settle any forfeiture action in which a civil complaint is threatened or filed; the policy simply requires prosecutors to include a release in those instances in which the prosecutor has made a judgment that settlement otherwise advances the public interest.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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